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Re Kirthiga Suthan a/l Kathiravellu & Anor

B HIGH COURT (KUALA LUMPUR) — NULLITY PETITION NO WA-33–708–12 OF 2022
EVROL MARIETTE PETERS J
28 MARCH 2023

C *Family Law — Marriage — Non-consummation — Joint petition for nullity of marriage — Whether there was evidence of incapacity of either party to consummate marriage — Whether there was evidence of wilful refusal on part of respondent to consummate marriage — Law Reform (Marriage and Divorce) Act 1976 ss 70(a), (b) & 73*

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The petitioners had registered their marriage on 9 June 2022, but they had never lived as husband and wife. The petitioners then made a joint decision to have their marriage annulled on the basis that they had no interest in remaining married to each other. The petitioners had filed a joint petition ('the petition') for nullity of marriage on the premise of non-consummation as stipulated in s 70 of the Law Reform (Marriage and Divorce) Act 1976 ('Act 164'). The issues arose were: (a) whether there was evidence of incapacity of either party to consummate the marriage; and (b) whether there was evidence of wilful refusal on the part of the respondent to consummate the marriage.

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Held, dismissing the petition:

(1) The first flaw of the petition was that there was no indication of which particular para of s 70 of Act 164 that was relied upon. A petition for nullity under s 70 of Act 164 had to be specific and precise. In fact, the counsel appeared to be unsure of the applicable provision, and when questioned, he responded that he would seek to rely on both paras (a) and (b) of s 70 of Act 164. The uncertainty displayed by the counsel in itself spoke volumes of this petition (see paras 4–5).

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(2) Section 70(a) of Act 164 indicated that proof that either party was incapable of consummating the marriage was required. The gist of this provision was that there must be some element of psychological or sexual aversion. In the present case, there was no evidence whatsoever to indicate that either party was incapable of consummating the marriage pursuant to para (a) of s 70 of Act 164, as such, reliance on this provision was untenable (see paras 7, 9 & 11).

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(3) The glaring mistake in this petition was the fact that the petition was filed jointly when it was premised on para (b) of s 70 of Act 164. It was clearly

stated in para (b) that the refusal to consummate must be on the part of the respondent and not petitioner. A petition for nullity, therefore, ought to be made by a petitioner, on the basis that the respondent had wilfully refused to consummate the marriage. In the present case, as evident from this petition itself, there was no respondent, as the petition was filed by both the petitioners, with both admitted to refusing to consummate. In the court's view, it would make a mockery of the provision to allow a petitioner to file a petition for nullity on the basis of his or her own refusal to consummate the marriage (see paras 13–15).

(4) In the present case, a perusal of the petition indicated that both petitioners had consented to have the marriage annulled on the basis that they had both agreed not to consummate the marriage, and as such, to end it. The only reason provided was that the petitioners had no interest in consummating or remaining in the marriage. In the court's view, that did not amount to a just excuse that fell within the purview of 'wilful refusal'. Under such circumstances, reliance on para (b) of s 70 of Act 164 was untenable (see paras 17–18).

(5) A petition for nullity was not and should never be filed as a shortcut to divorce. Both petitioners were of sound mind and above the age of majority when they had registered their marriage in 2022, and should realise that registration rendered a marriage valid, and with legal consequences. It was not something that should be viewed lightly (see para 19).

(6) The petitioners' disregard for the law was also evident by the prayer for their marital status to revert to 'single', which was in contravention with s 73 of Act 164. Since this petition was filed pursuant to s 70 of Act 164, the petition, if allowed, would have rendered the marriage voidable, and as such, the marriage would have existed up to the time the petition was allowed. Allowing the petitioners to revert to 'single' status, therefore, would not be in accordance with s 73 of Act 164. Further, the court found that this petition was nothing but an abuse of the process of the court (see paras 22 & 24).

[Bahasa Malaysia summary

Kedua-dua pempetisyen telah mendaftarkan perkahwinan mereka pada 9 Jun 2022 tetapi mereka tidak pernah hidup sebagai suami isteri. Mereka kemudian membuat keputusan bersama untuk membatalkan perkahwinan mereka atas dasar mereka tidak berminat untuk kekal berkahwin antara satu sama lain. Kedua-dua pempetisyen telah memfailkan petisyen bersama ('petisyen tersebut') untuk membatalkan perkahwinan atas premis tiada persetubuhan dilakukan seperti yang ditetapkan dalam s 70 Akta Memperbaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 164'). Isu-isu yang timbul ialah: (a) sama ada terdapat keterangan ketidakupayaan

A mana-mana pihak untuk melakukan persetubuhan dalam perkahwinan; dan (b) sama ada terdapat keterangan bahawa responden bersengaja enggan melakukan persetubuhan dalam perkahwinan.

Diputuskan, menolak petisyen:

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(1) Kepincangan pertama petisyen tersebut ialah tidak ada petunjuk tentang perenggan dalam s 70 Akta 164 yang mana yang digunapakai. Petisyen untuk pembatalan di bawah s 70 Akta 164 mestilah khusus dan tepat. Malah, peguam kelihatannya tidak pasti dengan peruntukan yang terpakai, dan apabila disoal, dia menjawab bahawa dia ingin bergantung pada kedua-dua perenggan (a) dan (b) s 70 Akta 164. Ketidakpastian yang ditunjukkan oleh peguam dengan sendirinya menunjukkan dengan jelas tentang petisyen ini (lihat perenggan 4–5).

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(2) Seksyen 70(a) Akta 164 menunjukkan bahawa bukti bahawa mana-mana pihak tidak mampu untuk melakukan persetubuhan dalam perkahwinan adalah diperlukan. Inti pati peruntukan ini adalah bahawa perlu ada unsur keengganan psikologi atau seksual. Dalam kes ini, tiada apa-apa keterangan yang menunjukkan bahawa mana-mana pihak tidak mampu untuk melakukan persetubuhan dalam perkahwinan menurut perenggan (a) s 70 Akta 164, oleh itu, pergantungan kepada peruntukan ini tidak boleh dipertahankan (lihat perenggan 7, 9 & 11).

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(3) Kesilapan yang ketara dalam petisyen ini ialah hakikat bahawa petisyen telah difailkan secara bersama apabila ia didasarkan pada perenggan (b) s 70 Akta 164. Jelas dinyatakan dalam perenggan (b) bahawa keengganan untuk melakukan persetubuhan mestilah oleh responden dan bukan pempetisyen. Oleh itu, petisyen untuk pembatalan hendaklah dibuat oleh pempetisyen, atas dasar responden bersengaja enggan untuk melakukan persetubuhan dalam perkahwinan. Dalam kes ini, seperti yang terbukti daripada petisyen ini sendiri, tidak terdapat responden, kerana petisyen tersebut difailkan oleh kedua-dua pempetisyen, dengan kedua-duanya mengaku enggan melakukan persetubuhan. Pada pandangan mahkamah, ia akan mempersendakan peruntukan tersebut untuk membenarkan pempetisyen memfailkan petisyen untuk pembatalan atas dasar keengganannya sendiri untuk melakukan persetubuhan dalam perkahwinan tersebut (lihat perenggan 13–15).

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(4) Dalam kes ini, pembacaan ke atas petisyen tersebut menunjukkan bahawa kedua-dua pempetisyen telah bersetuju untuk membatalkan perkahwinan tersebut atas dasar bahawa mereka berdua bersetuju untuk tidak melakukan persetubuhan dalam perkahwinan tersebut, dan oleh itu, untuk menamatkannya. Satu-satunya alasan yang diberikan adalah bahawa pempetisyen-pempetisyen tidak mempunyai keinginan untuk melakukan persetubuhan atau kekal dalam perkahwinan tersebut. Pada pandangan mahkamah, itu tidak berjumlah kepada alasan yang adil yang

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termasuk di bawah 'bersengaja enggan'. Dalam keadaan sedemikian, pergantungan pada perenggan (b) s 70 Akta 164 tidak boleh dipertahankan (lihat perenggan 17–18).

(5) Petisyen untuk pembatalan bukan dan tidak boleh difailkan sebagai jalan pintas untuk bercerai. Kedua-dua pempetisyen mempunyai pemikiran yang waras dan melebihi umur dewasa semasa mendaftarkan perkahwinan mereka pada tahun 2022, dan harus menyedari bahawa pendaftaran tersebut menjadikan perkahwinan tersebut sah, dan mempunyai kesan undang-undang. Ia bukanlah sesuatu yang harus dipandang ringan (lihat perenggan 19).

(6) Pengabaian oleh pempetisyen-pempetisyen terhadap undang-undang juga terbukti dengan permohonan mereka agar status perkahwinan mereka kembali kepada 'bujang', yang bercanggah dengan s 73 Akta 164. Memandangkan petisyen ini difailkan menurut s 70 Akta 164, petisyen tersebut, jika dibenarkan, akan menyebabkan perkahwinan terbatal, dan oleh itu, perkahwinan tersebut akan wujud sehingga masa petisyen tersebut dibenarkan. Oleh itu, membenarkan pempetisyen-pempetisyen kembali kepada status 'bujang' adalah bertentangan dengan s 73 Akta 164. Selanjutnya, mahkamah mendapati bahawa petisyen ini tidak lain hanyalah penyalahgunaan proses mahkamah (lihat perenggan 22 & 24).]

Cases referred to

Horton v Horton [1947] 2 All ER 871, HL (folld)
Jodla v Jodla (otherwise Czarnomska) [1960] 1 All ER 625 (refd)
L v L [1956] 1 MLJ 145; [1956] 1 LNS 52 (refd)
SY v SY (otherwise W) [1963] P 37, CA (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act ss 52, 70, 70(a), (b), 73

Muhammad Iman bin Johar (Selva Mookiah & Assoc) for the petitioner.

Evrol Mariette Peters J:

THE FACTUAL BACKGROUND

[1] This was a joint petition for nullity of marriage filed by both petitioners ('the petitioners') on the premise of non-consummation as stipulated in s 70 the Law Reform (Marriage and Divorce) Act 1976 ('Law Reform (Marriage and Divorce) Act').

[2] The petitioners had registered their marriage on 9 June 2022. They claimed that they had never lived as husband and wife, and soon after, made the joint decision to have their marriage annulled on the basis that they had no

interest in remaining married to each other.

[3] In December 2022, the petitioners filed a joint petition ('this petition') seeking a nullity of their marriage. This petition was dismissed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

[4] The first flaw I had noticed in this petition was that there was no indication of which particular paragraph of s 70 of the Law Reform (Marriage and Divorce) Act that was relied upon.

[5] In my view, a petition for nullity under s 70 of the Law Reform (Marriage and Divorce) Act has to be specific and precise. In fact, Counsel appeared to be unsure of the applicable provision, and when questioned, he responded that he would seek to rely on both paras (a) and (b) of s 70 of the Law Reform (Marriage and Divorce) Act. The uncertainly displayed by counsel in itself spoke volumes of this petition.

Whether there was evidence of incapacity of either party to consummate the marriage

[6] Paragraph (a) of s 70 of the Law Reform (Marriage and Divorce) Act reads:

> Section 70 — *Grounds on which a marriage is voidable*
>
> A marriage which takes place after the appointed date shall be voidable on the following grounds only, that is to say —
>
> (a) that the marriage has not been consummated *owing to the incapacity of either party to consummate it*;
>
> ... (Emphasis added.)

[7] A perusal of para (a) of s 70 of the Law Reform (Marriage and Divorce) Act indicates that proof, that either party was incapable of consummating the marriage, is required.

[8] According to the case of *L v L* [1956] 1 MLJ 145; [1956] 1 LNS 52, the words 'incapacity ... to consummate' found in para (a) of s 70 of the Law Reform (Marriage and Divorce) Act, refers to the 'inability to have sexual intercourse based on physical abnormality or psychological impotence'. A person who suffers from 'invincible repugnance to the act of intercourse with the other' may thus be regarded as incapable of consummating the marriage: see *SY v SY (otherwise W)* [1963] P 37.

[9] Be that as it may, the gist of para (a) of s 70 of the Law Reform (Marriage and Divorce) Act is that there must be some element of psychological or sexual aversion.

[10] In the present case, a perusal of the petition indicated that the petitioners had consented to have the marriage annulled on the basis that they had both agreed not to consummate the marriage, and as such, to end it. The relevant parts of the petition read as follows:

> 4. Kedua-dua Pempetisyen telah bersetuju sesama sendiri bahawa perkahwinan mereka sepatutnya dibatalkan dan mereka dengan relanya bersetuju ke atasnya kerana *Pempetisyen Suami dan Pempetisyen Isteri tidak berniat dan/ atau enggan melakukan sebarang persetubuhan* untuk menyatukan perkahwinan (refusal to consummate the marriage).
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> ...
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> 7. Pempetisyen-pempetisyen bersetuju bahawa Perkahwinan tersebut dibatalkan seperti di dalam seksyen 68 dan 70 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 *sebab tidak mahu bersama lagi dan tidak berminat untuk melakukan persetubuhan untuk menyatukan perkahwinan* (refusal to consummate the marriage). (Emphasis added.)

[11] There was no evidence whatsoever to indicate that either party was incapable of consummating the marriage pursuant to para (a) of s 70 of the Law Reform (Marriage and Divorce) Act. As such, reliance on para (a) of s 70 of the Law Reform (Marriage and Divorce) Act was untenable.

Whether there was evidence of willful refusal on the part of the respondent to consummate the marriage

[12] Counsel had also proceeded to rely on para (b) of s 70 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 70 — Grounds on which a marriage is voidable
>
> A marriage which takes place after the appointed date shall be voidable on the following grounds only, that is to say —
>
> ...
>
> (b) that the marriage has not been consummated *owing to the wilful refusal of the respondent to consummate it*;
>
> ... (Emphasis added.)

[13] The glaring mistake in this petition was the fact that the petition was filed jointly when it was premised on para (b) of s 70 of the Law Reform (Marriage and Divorce) Act.

[14] It is clearly stated in para (b) of s 70 of the Law Reform (Marriage and Divorce) Act, that the refusal to consummate must be on the part of the respondent and not petitioner. A petition for nullity, therefore, has to be made by a petitioner, on the basis that the respondent had wilfully refused to consummate the marriage.

[15] In the present case, as evident from this petition itself, there was no respondent, as the petition was filed by both petitioners, with both admitted to refusing to consummate. In my view, it would make a mockery of the provision to allow a petitioner to file a petition for nullity on the basis of his or her own refusal to consummate the marriage.

[16] In any event, on the meaning of 'wilful refusal', I drew guidance from the case of *Horton v Horton* [1947] 2 All ER 871, in which the phrase was defined as 'a settled and definite decision come to without just excuse'. Reference was made also to the case of *Jodla v Jodla (otherwise Czarnomska)* [1960] 1 All ER 625, where Hewson J, in referring to *Horton v Horton*, described 'wilful refusal' as a refusal to consummate without just excuse.

[17] In the present case, a perusal of the petition, as alluded to earlier, indicated that both petitioners had consented to have the marriage annulled on the basis that they had both agreed not to consummate the marriage, and as such, to end it. The only reason provided was that the petitioners had no interest in consummating or remaining in the marriage. In my view, that did not amount to a just excuse that fell within the purview of 'wilful refusal'.

[18] Under such circumstances, reliance on para (b) of s 70 of the Law Reform (Marriage and Divorce) Act was untenable.

[19] At this juncture, I am compelled to state that a petition for nullity is not, and should never be filed as a shortcut to divorce. Both petitioners were of sound mind and above the age of majority when they had registered their marriage in 2022, and should realise that registration renders a marriage valid, and with legal consequences. It is not something that should be viewed lightly.

[20] It was unfortunate that both petitioners had a change of heart after registration of the marriage, which was solemnised at the Sri Subramaniar temple. However, this court is not in a position to churn out 'quickie divorces' clothed in nullity petitions filed by couples who, after registration, are flippant about their obligations and decide at their whim that they are no longer interested in remaining in their marriage. I would have expected counsel or the solicitors for the petitioners to have advised them accordingly, on the law and facts.

[21] The petitioners' disregard for the law was also evident by the prayer for their marital status to revert to 'single', which goes against s 73 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 73 — Effect of decree of nullity in case of voidable marriage
>
> (1) If the court finds that the petitioner's case has been proved it shall pronounce a decree of nullity.
>
> (2) A decree of nullity granted after the appointed date on the ground that marriage is voidable shall operate to annul the marriage only as respects any time after the coming into operation of the decree, and *the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time.* (Emphasis added.)

[22] Since this petition was filed pursuant to s 70 of the Law Reform (Marriage and Divorce) Act, the petition, if allowed, would have rendered the marriage voidable, and as such, the marriage would have existed up to the time the petition was allowed. Allowing the petitioners to revert to 'single' status, therefore, would not be in accordance with s 73 of the Law Reform (Marriage and Divorce) Act.

[23] However, if the petitioners persist in abandoning their marriage, they are free to do so by filing a joint petition for divorce pursuant to s 52 of the Law Reform (Marriage and Divorce) Act, as and when the time arises. The provision reads:

> Section 52 — Dissolution by mutual consent
>
> If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of *two years from the date of their marriage present a joint petition* accordingly and the court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit. (Emphasis added.)

CONCLUSION

[24] In fact, I would go as far as to state that this petition was nothing but an abuse of the process of court, and, as such, based on the aforesaid reasons, and after careful scrutiny and judicious consideration of the affidavit evidence before this court, this petition was dismissed.

Petition dismissed.

Reported by Dzulqarnain Ab Fatar